

**Broker Protection Clauses**  
**(Owners Obligations after the Expiration of the Listing)**

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By: Edward I. Sumber, Esq.

A real estate brokerage commission case in United Real Estate & Property Management, Inc. v. Ihar Unkown a/k/a Igor Charnyshov and Volha Yablonskaya (28 Misc.3d 804, 905 N.Y.S.2d 487, 2010 N.Y. Slip Op. 20228) is a perfect reminder as to why our MLS and most MLS standard listing agreements include a broker protection clause. The United Real Estate case was decided in Kings County Civil Court on June 11, 2010. In summary, the Court held that when a salesperson left her broker's office to affiliate elsewhere and the listing expired, even though negotiations were in process at the time that the salesperson changed offices, the original broker could not secure payment of its commission because no broker protection clause existed in the listing agreement.

**What is an Extension Clause (a Broker Protection Clause)?**

Our MLS model form includes an extension provision granting rights to the broker after the listing expires under specific circumstances. This clause, referred to as "**OWNER(S) OBLIGATIONS AFTER THE EXPIRATION OF THIS AGREEMENT**", states as follows:

**"4. Owner(s) understands and agrees to pay the commission referred to in paragraph 3, if (a) the property is sold or transferred, or (b) is the subject of a written contract of sale, or (c) if the Owner(s) reach a verbal agreement with a buyer regarding the material terms of the sale, either during the period of this Agreement, or within \_\_\_\_\_ months after the expiration date of this Agreement involving a person, directly or indirectly, with whom the Agent or a Cooperating Broker or the Owner(s) negotiated or to whom the property is offered, quoted or shown during the period of this listing Agreement. Owner(s) will not, however, be obligated to pay such commission if Owner(s) enters into a valid Exclusive Listing Agreement with another New York State licensed real estate broker after the expiration of this Agreement."**

**Model Listing Agreement Including Extension Clause**

Although the MLS model forms include an extension clause, all the provisions of an exclusive agency or exclusive right to sell agreement are fully negotiable between the owner and the listing agent. Nothing in law or otherwise, compels the inclusion of an "extension provision" in the listing agreement.

**Why is the Extension Clause Negated by a**

## **New Listing Agreement with a New Broker?**

When exclusive right to sell and exclusive agency agreements were being developed by multiple listing services in the early 1970s, the Department of State took notice of the content of many of these agreements and in particular, extension clauses. Patrick Cea, then General Counsel to the New York State Department of State's Division of Licensing Services, was particularly concerned that these "extension clauses" could potentially result in the payment of two commissions in a single transaction. His fear was that a consumer, whose house did not sell during the listing period, would relist the property with a new broker. Thereafter, a transaction would come about, a commission would be paid to the new broker and then the prior broker would make a claim under the extension agreement that the original listing broker had in fact, brought the buyer to the property during the first listing period although a contract had not yet been signed. Mr. Cea requested that all multiple listing services which provide a model form for its participants and which include an extension clause, include the verbiage:

**"Owner(s) will not, however, be obligated to pay such commission if Owner(s) enter into a valid exclusive listing agreement with another New York State licensed real estate broker after the expiration of this agreement".**

Accordingly, even after an extension clause is included in the listing agreement, if the owner lists exclusively with a new broker after the listing agreement expires, the prior broker will be precluded from claiming a commission.

### **What if the Listing Agreement Does not Include an "Extension Clause"?**

This is the very issue which arose in *United Real Estate & Property Management, Inc. v. Ihar Unknown* referred to in the introductory paragraph.

On April 1, 2006, *United Real Estate & Property Management, Inc.* ("United"), through its salesperson, Olga Natsentova, entered into a listing agreement with the defendants who gave an exclusive right to sell agreement to United for the sale of the defendants' apartment. The listing agreement expired on July 1, 2006. The listing agreement did not include an "extension clause". Before the agreement terminated on July 1, 2006, Ms. Natsentova procured a ready, willing and able buyer to purchase the apartment. However, the prospective purchaser did not sign a contract for the purchase of the apartment prior to the time that the listing expired. As soon as the listing expired, the apartment owners entered into a new listing agreement with Maximillion Realty. Two days later, Ms. Natsentova terminated her affiliation with United and became affiliated with Maximillion. Upon advice from Maximillion Realty, the defendant owners (i.e. "Ihar Unknown") lowered the listing price of the property and subsequently signed the Contract one day later with the buyer procured by Ms. Natsentova. The sale closed on October 6, 2006 and Maximillion Realty received its commission. United brought this

action indicating that it should have been the recipient of the brokerage commission because it was the procuring cause of the sale.

### **What Must a Broker Prove in Order to Receive a Commission?**

The Court noted that in order for a broker to receive a commission it:

**“must show: a) that he or she is duly licensed; b) that he had a contract, expressed or implied, with the party to be charged with paying the commission; and c) that he or she was the “procuring cause” of the sale.”**

The mere introduction of a buyer to a seller was noted by the Court to be sufficient to:

**“set in motion the chain of circumstances that led to the sale. To entitle a broker to compensation it is sufficient that a sale be effected through his agency as its procuring cause; and if his communications with the purchaser are the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned.”**

Based upon the foregoing, the Court stated that when determining the right to a broker’s commission after the expiration of a listing agreement,

**“the Courts look to the actual contractual agreement to see if there is an extension clause (see *Sunset 3 Realty, Inc. v. Russo*, 7 Misc. 3d 1015A (NY Sup. Ct. 2005), 801 N.Y.S.2d 243 (NY Sup. Ct. 2005)). An extension clause is commonly included in a real estate listing contract to protect a broker from loss of compensation when a property is sold by the owner after the termination of the listing contract to a person who was introduced to the property by the broker (see *Picotte Real Estate, Inc. v. Gaughan*, 107 AD2d 996, 997 (NY App. Div. 3d Dep’t 1985)).”**

### **The Salesperson’s Conduct was in Bad Faith.**

The Court looked at the behavior of Ms. Natsentova and stated,

**“While the plaintiff contends, and the Court agrees, that its former agent, Olga Natsentova, acted in bad faith in retaining the full broker’s commission for herself, the Court notes that Ms. Natsentova is not a party in this action. The plaintiff has no recourse against such behavior because it did not protect itself by including an extension clause in the listing agreement.”**

Consequently the Court rejected the claim of United and denied it a commission.

### **Should a Listing Agent Insist Upon an Extension Clause?**

Real estate listing agreements are fully negotiable between listing agents and owners. Sophisticated owners and/or their attorneys may seek to remove extension clauses, add “when, as and if” clauses and change other terms of the listing agreement. Brokers face such negotiations daily. The Court’s decision in the *United* case is a red flag for any listing agent. It is a clear reminder that the model form of agreement provided by the MLS for optional use by its participants, has been carefully thought out by committees serving the MLS over the past thirty-five years. Relinquishing one’s rights to an insistent owner may result in the broker obtaining the listing but ultimately losing a commission.

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Legal Column author Edward I. Sumber, Esq. is a partner at the law firm of Edward I. Sumber, P.C. The firm has been counsel to the Westchester Putnam Association of Realtors, Inc. since 1974 and the firm was responsible for incorporating the Empire Access Multiple Listing Service, Inc. in 1976. For information about Edward I. Sumber, P.C. go to <http://www.sumberlawpc.com/>.